necessary that all the Commissioners shall agree upon the report to be made to the Court, but a majority have the right to reach a conclusion and file their report setting forth that conclusion. If the minority desire to do so, they may file a minority report.

Instruction E

The Court instructs the Commissioners that the only issue in this case is the fair market value of the land to be taken because the Breaks Interstate Park Commission is taking the entire tract of the owners and, therefore, there is no issue in this case as far as damages to the residue is concerned.

Instruction F

The Court instructs the Commissioners that while the parties to this proceeding have the right to present evidence, oral or otherwise, and you should consider all the evidence, you are not bound by the opinion of experts or by the apparent weight of the evidence but, taking into consideration what you saw upon your view of the land, you may determine the present fair market value of the land and fix compensation and damages, if any, in the manner set forth in the other instructions of the Court.

Instruction G

The Court instructs the jury that the coal, oil and gas are not being taken and that you shall not award any amount for the same.

Instruction I

The Court instructs the Commissioners to find for the defendants Crissie Kiser, James C. Kiser, John Henry Epling and Edna Epling and Dwight Flynt and Lockie Flynt as their interests appear, respectively, such a sum as you may believe from a preponderance of the evidence is just compensation for their property being

taken, considering said property for whatever uses it may reasonably be adapted, and award compensation upon the basis of its most advantageous and valuable use as of the time of taking thereof, which is this date.

The Court then further instructed the Commissioners: "These are the Court's instructions, not given on behalf of either party. They constitute the law. As far as the evidence is concerned, you will weigh that from the witnesses you heard testify in this case and apply it to the law as contained in these instructions."

The Clerk read the instructions, closing argument was heard on behalf of the defendant and the petitioners, after which argument the Commissioners retired to the jury room and returned with their award. (T. 96) The report of the Commissioners has been printed as Appendix C to the petitioners' Petition.

The petitioners excepted to the report of the Commissioners and the Court overruled each and every exception and entered final judgment in the form of a Final Order confirming the Commissioner's Report. From the action of the Circuit Court for Dickenson County, the petitioners appealed to the Supreme Court of Appeals of Virginia for a writ of error. The Supreme Court of Appeals maturely considered the Petition for Appeal to that Court and was of the opinion that the order of the Circuit Court for Dickenson County was plainly right and refused an appeal, the effect of which was to affirm the Order of the Circuit Court of Dickenson County. The petitioners then filed a Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia in this proceeding.

II. FACTS MATERIAL TO THE CASE

In view of the extensive explanation of the material proceedings in the lower courts above stated, the facts can be stated with reasonable brevity. During the trial of the case in the lower court, Leslie M. Mullins and Glyn Phillips were counsel for Breaks Interstate Park Commission. A. M. Phipps and J. Ervin Sanders were counsel for the petition-

ers. Neither Mr. A. M. Phipps nor Mr. J. Ervin Sanders are counsel for petitioners in the appellate proceedings. Counsel for petitioners in the appellate proceeding is S. H. Sutherland of Clintwood, Virginia.

On the day of the trial, after the Commissioners were sworn, before and after the taking of the view, counsel for Breaks Interstate Park Commission and counsel for the petitioners stipulated that the only issue was the amount of damages for the taking of the surface of the petitioners. (T. 24)

A survey was made by W. R. Blair, Engineer, which was filed as "Exhibit D" with the Petition. Mr. Blair made his survey on the basis of the deeds and there was a discrepancy between the line that Mr. Blair surveyed on the map and the old fence line on the tract of James C. Kiser and Crissie Kiser. (T. 4) The discrepancy between the line in the deed as it appeared on the ground and the old fence line was pointed out to the Commissioners and the old fence line which Mr. James C. Kiser and Crissie Kiser contended was the correct line was a doubt resolved in favor of the petitioner, Crissie Kiser, and one-half of an acre was added to her acreage. (T. 4, 5, 6) With this discrepancy between the calls of the deed and the old fence line being resolved, the description and the acreage was perfectly agreeable with James C. Kiser and Crissie Kiser. (T. 94) Thus, any discrepancy in the acreage was resolved in favor of the only complaining party to the description of the property, namely, the petitioners, Crissie Kiser and James C. Kiser.

The next item to be clarified by the parties was the coal, gas and oil. Three deeds filed with the Petition as Exhibits A, B & C all showed that the coal had been sold and conveyed.

Paragraph 5 of the petitioners' answer admitted that the petitioners did not own the coal under the land and they stated that the Pittston Company was the owner of the coal so far as they were advised. The Pittston Company was not made a party defendant to the proceedings and it was not intended by the Breaks Interstate Park Commission to

take any coal belonging to the Pittston Company. Apparently, Attorney Sanders thought the petitioners owned the coal under the land and it was made perfectly plain to the parties and to the Court that the defendant was taking only the surface and not the coal, oil and gas. (T. 52, 88, 89, 90). Also, Breaks Interstate Park Commission made it perfectly clear that they were not taking the coal which did not belong to the petitioners and were not taking the gas and oil, if any existed, that did belong to the petitioners.

In order that the Commissioners would not be mislead as to what was being taken by the defendant of the petitioners, the Court instructed the Commissioners in Instruction G that the coal, oil and gas were not being taken by the Breaks Interstate Park Commission and that the Commissioners shall not award any amount for the same.

The three tracts of land that were condemned by the Breaks Interstate Park Commission was mountainous land lying close to a rugged mountainous region where the Breaks Interstate Park is being developed. The land was poor hillside land and there were no signs that it had been in cultivation for a number of years. (T. 11, 12, 16, 33, 34) There were no buildings on the property. Two of the petitioners were non-residents. They had to move out of the community like a lot of other people to find better employment. (T. 88, 96)

A greal deal was said about the trees on two tracts of the land by both witnesses for the petitioners and witnesses for the defendant. The Commissioners saw the trees. They were experienced business men. To support their findings of the value of land, there is ample evidence. W. R. Blair, Engineer, testified that he saw a few trees when he surveyed the land and walked through the woods with the Commissioners. (T. 9)

Roy Deel had been Commissioner of Revenue for Dickenson County for many years. (T. 13) Deel was also a member of the Board of Assessors to appraise all property in Dickenson County. (T.18) He put a value on the Crissie Kiser tract and the John Henry Epling tract of $60.00 an

acre as a whole. He put a value on the Lockie C. Flynt tract as a whole of $80.00 an acre. (T. 16, 17) In putting his value on the property, Roy Deel took into consideration the timber. He viewed the trees as an experienced timberman. (T. 13, 14, 15, 20) He testified that the trees were not economically feasible or profitable to log. (T. 15, 16) He also testified that there was little timber on the Lockie Flynt tract of land and that it was steep and without improvements. (T. 17)

Another witness, Bob Newberry, testified on behalf of the defendant. He was a former Treasurer of Dickenson County. He was also on the Board of Appraisers to reassess property in Dickenson County. The function of the Board was to appraise the County's real estate. Bob Newberry also was a property owner who had bought and sold property. (T. 27) He was familiar with the land sought to be condemned and said the timber had no value. (T. 27, 29)

Henry Carty, another witness, had done extensive buying of trees and timber. He testified that the trees could not be logged at a profit. (T. 33) A number of witnesses testified for the petitioners. They were either relatives or, in most instances, resided a considerable distance away from the land sought to be condemned.

After extensive testimony by both sides, instructions were offered to the Court by counsel for the petitioners and the defendant and were given by the Court **without objection.** (T. 96)

Whereupon, the Commissioners retired and returned with their report taking into consideration their own view of the premises and the evidence of witnesses.

ARGUMENT

Reasons for Refusing the Writ

All disputes as to the description of the surface sought to be condemned were resolved in favor of the petitioners in the lower court. The petitioners, James C. Kiser and Crissie C. Kiser, participated in resolving the dispute as to

the boundary line and an additional one-half acre was added to the surface sought to be taken from them. (T. 4, 5, 6)

The petitioners,, in their Petition, have quoted extensively and written voluminously about the Instructions. However, the record plainly shows that the Instructions were offered by the Court by counsel for the petitioners and the defendant, and were given by the Court **without objection.** (T. 96)

Manifestly, it would be grossly unjust to the trial court to permit the Instructions to be objected to for the first time in the appellate court where the record plainly shows there were no objections or exceptions to the Court's Instructions which could have been corrected by the trial court in the event they were erroneous. However, the Instructions are proved Instructions and trial counsel for both parties felt the Instructions were fair and just as indicated by the fact that there were no objections to the Court's Instructions.

Where the Commissioners in condemnation proceedings have been instructed, without objection from either party, as to the elements of damages to be considered by them, and they have made a report in accordance with such Instructions, the report will not be set aside. **Tidewater Railway Co. v. Cowan,** 106 Va. 817, 56 S. E. 819, 822. The Supreme Court of Virginia in that case had the following to say:

> "Whether all of the elements of damage referred to in these instructions were proper elements of damage to be considered by the Commissioners, we are not called upon to decide, and do not intend that anything said in this opinion is to be so construed, as the instructions were given without objection, and neither party can be allowed to complain that the Commissioners did what they were told it was their duty to do."

The same language of the Court is contained in 6 Mich. Jur., Va. & W. Va., Eminent Domain, Sec. 81, page 769, where the following language appears:

> "But where the commissioners in condemnation proceedings have been instructed, without objection from

either party, as to the elements of damages to be considered by them, and they have made a report in accord with such instructions, the report will not be set aside."

The defendant further argues that the Commissioners had wide discretion in determining its award based upon its own view and the evidence of witnesses.

The reasoning for the foregoing is amply stated in 6 Mich. Jur., Eminent Domain, Sec. 81, page 768, where the following appears:

"Sec. 81. Generally. - Where the proceedings are conducted according to law, and the evidence as to just compensation is in conflict, the court of appeals cannot set aside the finding of the commissioners, unless they proceeded upon erroneous principles, or unless the amount allowed is so grossly inadequate as to show prejudice or corruption on the part of the commissioners. They may base their findings largely upon facts obtained by a view of the property, which do not appear in the record. The law lays great stress upon the matter of the view, the effect of which cannot always be transmitted.

Where there is shown that numerous witnesses testify directly opposite to each other as to the value of the land, it is impossible for the court of appeals to say that the confirmation of the report by the trial court, who saw the witnesses and heard them testify, is plainly wrong or without evidence to support it."

It requires very strong evidence of inadequacy or excess in the appraised value of the land and damages to influence the court, for that cause alone, to set aside the report. 6 Mich. Jur., Eminent Domain, Sec. 82, page 770, and, further, on page 770 and 771, 6 Mich. Jur., Eminent Domain, the following appears:

"The assessment of damages will not be set aside for inadequacy of amount where the evidence is conflicting and there is nothing to show that the damages allowed, if inadequate at all, are so inadequate as to show pre-

judice or corruption. However, the courts should scrutinize carefully the reports of commissioners in eminent domain proceedings and if the damages are plainly excessive, they should reform the same.

The commissioners are not bound by the opinions of experts, or the apparent weight of the evidence, but having viewed the premises, they may give their own conclusions, and for a mere error in judgment, as to the amount of damages, there is no redress. While, if members of the commission, some of the members of the appellate court might have voted for a larger compensation, if the compensation allowed by the commissioners cannot be said to be so grossly inadequate to show prejudice or bias on their part, the award cannot be disturbed."

See also, **Va. Electric & Power Co. v. Pickett,** 197 Va. 269, 89 S.E. 2d 76.

It was stipulated that the only question involved in the proceeding in the Circuit Court of Dickenson County was the question of how much compensation should be allowed for the petitioners' surface. (T. 24) Mention was made that the records of the Breaks Interstate Park Commission as to its Minutes were in Richmond and would be furnished to counsel for petitioners upon request. No request was ever made for those minutes. Therefore, the defendant, Breaks Interstate Park Commission, takes the position that the stipulation which was made in open Court by the parties to the cause and acted upon by the Court and by the parties are binding and that a judgment founded thereon will not be reversed.

The following is found in 17 Mich. Jur., Stipulations, Sec. 1, page 371:

"Admissions and agreements made in open court by the parties to the cause and acted upon by the court are binding and a decree founded therein will not be reversed. Such admissions and stipulations, made honestly and in good faith, are everywhere encouraged by the courts, and a trial conducted on stipulations of fact is

no less a 'hearing' than is one at which the witnesses testify at length."

See, also, **United States of America v. Town of Knoxville**, 224 Fed. Rep. 2d 712.

The assignments of error brought up in the Supreme Court of Appeals for the first time and not in the lower court are not proper matters to be considered by the Supreme Court of Appeals of Virginia upon the appeal by the petitioners to that court.

It is respectfully submitted that the trial court was clearly right in overruling the petitioners' exceptions to the report of the Commissioners and in confirming the report of the Commissioners in all particulars and in entering judgment for the Breaks Interstate Park Commission in the eminent domain proceeding. It is also respectfully submitted that the judgment of the Supreme Court of Appeals of Virginia was plainly right in rejecting the Petition for a Writ of Error to that court and in refusing said appeal to that Court, the effect of which was to affirm the order of the Circuit Court of Dickenson County, Virginia.

In view of the fact that the petitioners have substantially abandoned all of their assignments of error before the Supreme Court of Appeals of Virginia, with the exception that the property was taken without due process of law, and in view of the fact that the substantial question presented to the Supreme Court of the United States in the Petition for a Writ of Certiorari was the view of the Commissioners and the weight to be accorded to their view, it is respectfully submitted that the writ should be denied.

The proceeding in the lower court was conducted under the authority of Title 25 of the Code of Virginia, as amended.

There was no objection to the jurisdiction of the Court or to the appointment of Commissioners in the determination of preliminary issues in fixing the date of the trial on issues of just compensation as provided by Section 25-46.17 of the Code of Virginia, as amended, which reads as follows:

"Sec. 25-46.17. Determination of preliminary issues; fixing date of trial on issue of just compensation. - At the hearing upon the petition and application for the appointment of commissioners made in accordance with Sec. 25-46.9 if no answer and grounds of defense has been filed objecting to the jurisdiction if the court to hear the case and to proceed with the appointment of commissioners, the court shall enter an order fixing a date for the trial of the issue of just compensation and stating that such issue shall be determined by a commission or by the court, as provided in Sec. 25-46.19. If any answer and grounds of defense has been filed objecting to the jurisdiction of the court, the court shall determine such issues or other matters in controversy, excepting the issue of just compensation or matters relating to the ownership of any land or other property or the interest of any party in such land or other property, and if the court determines all such issues or other matters involving the jurisdiction of the court in favor of the petitioner, the court shall enter an order fixing a date for the trial of the issue of just compensation and stating that such issue shall be determined by a commission or by the court, as provided in Sec. 25-46.19.

An order of the court in favor of the petitioner on any of the foregoing preliminary issues or matters shall not be a final order for purposes of appeal but an order against the petitioner on such issues or matters shall be a final order for purposes of appeal, if the petitioner so elects. If the order against the petitioner does not dismiss the petition, the petitioner may elect to proceed with the case without waiving any of its objections and exceptions to the rulings of the court.

At such hearing the court may also determine whether the petitioner shall have the right of entry as provided in Sec. 25-46.8.

The issue of just compensation was to be determined by Sec. 25-46.19 of the Code of Virginia which provides as

follows:

> Sec. 25-46.19. How issue of just compensation to be determined. - If the statute granting the power of eminent domain does not specifically provide that a specially constituted tribunal shall determine the issue of just compensation, such issue shall be determined by a commission selected in the manner hereinafter provided in Sec. 25-46.20. By agreement of the petitioner and all the parties who are sui juris that have appeared or answered, the issue of just compensation may be determined by the court.

The parties acted upon Sec. 25-46.20 in the appointment and oath of commissioners, which provides as follows:

> Sec. 25-46.20. Appointment and oath of commissioners; commissioners to fix value of property and damages. - If the issue of just compensation is to be determined by a commission, the court shall summon nine disinterested freeholders, or five disinterested freeholders if the parties so agree, who shall be residents of the county or city wherein the property or the greater portion of the property to be condemned is situated. If nine are summoned, the petitioner and the owners shall each have two peremptory challenges and the remaining five, or the original five if only five are summoned, shall be appointed, any three or more of whom may act, and shall fix the value of property to be taken and the damages, if any, to any other property beyond the peculiar benefits, if any, to such other property by reason of the taking and use thereof by the petitioner. Before executing their duties the commissioners shall take an oath before some officer authorized by the laws of this State to administer an oath, that they will faithfully and impartially ascertain what will be the value of the property to be taken and the damages, if any, to any other property beyond the peculiar benefits, if any, to such other property, by reason of such taking and use by the petitioner.

The view of Commissioners and the hearing of testi-

mony and the Commissioners' Report and exceptions to the report and hearing thereon was conducted according to Section 25-46.21 of the Code of Virginia, which provides as follows:

> "Sec. 25-46.21. View by commissioners; hearing of testimony; commissioners' report; exceptions to report and hearing thereon. - Upon the selection of the commissioners, the court shall direct them, in the custody of the sheriff or sergeant or one of his deputies, to view the property described in the petition with the owner and the petitioner, or any representative of either party, and none other, unless otherwise directed by the court; and, upon motion of either party, the judge shall accompany the commissioners upon such view. Such view shall not be considered by the commission or the court as the sole evidence in the case. Upon completion of the view, the court shall hear the testimony in open court on the issues joined. When the commissioners shall have arrived at their conclusion they shall make their report in writing to the court, or to the judge thereof in vacation. The report may be confirmed or set aside forthwith by the court, or the judge, as the case may be, provided that when the report is so filed before the court or judge passes thereon, either party shall have the right to file written exceptions to the report, which shall be filed not later than ten days after the rendering of the report by the commissioners. The court or the judge, as the case may be, shall have the same power over the commissioners' reports as it now has over verdicts of juries in civil actions.
>
> Upon hearing of exceptions to the commissioners' report the court shall not recall and question the commissioners as to the manner in which their report was determined unless there be an allegation in such written exceptions that fraud, collusion, corruption or improper conduct entered into the report. If such allegation is made the judge shall summon the commissioners to appear and he alone shall question them concerning their actions. If the court be satisfied that

fraud, collusion, corruption, or improper conduct entered in the report of the commissioners, the report shall be set aside and new commissioners appointed to rehear the case.

If the court be satisfied that no such fraud, collusion, corruption or improper conduct entered into the report of the commissioners, or no other cause exists which justify setting asideor modifying a jury verdict in civil actions, the report shall be confirmed."

Sec. 25-232 of the Code of Virginia, as amended, enables the Breaks Interstate Park Commission to condemn land on the same basis as other governmental agencies in the Commonwealth of Virginia, including the State Highway Commission.

The foregoing sections of the Code of Virginia of 1950, as amended, have been quoted or referred to for the purpose of showing that the condemnation proceedings were conducted according to law.

The substantial question raised by the petitioners of constitutionality of the Virginia eminent domain proceedings was raised in the case of **Williamson v. Hopewell Revelopment & Housing Authority,** 203 Va. 653, 125 S. E. 2d 849. The constitutional requirements for due process of law as to notice and opportunity to be heard were discussed and the court stated as follows:

"In John Doe v. Thomas Preston Brown, 203 Va. 508, 125 S.E. 2d 159, (decided April 23, 1962) we had occasion to discuss 'due process of law' with regard to notice and an opportunity to be hear. There we said: 'It is universally recognized that 'due process of law' requires that a person be given notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree or order may be entered affecting his right to liberty or property. But this does not mean that the legislature in its discretion may not prescribe the kind of notice and the manner in which it shall be given if it is reasonable under all the circum-

stances and affords the party affected a reasonable opportunity to be heard. Violett v. City Council of Alexandria, 92 Va. 561, 567, 570, 23 S.E. 909, 912, 31 L.R.A. 382, 53 Am.St. Rep. 825; Ward Lumber Co. v. Henderson-White Mfg. Co., 107 Va. 626, 630; 631, 635, 59 S.E. 476, 478, 480, 17 L.R.A., N.S., 324; A. S. White & Co. v. Jordan, 124 Va. 465, 466-471, 98 S.E. 24.'

In Dohany v. Rogers, 281 U.S. 362, 369, 50 S.Ct. 299, 74 L. Ed. 904, 68 A.L.R. 434, the court stated:

'The due process clause does not guarantee to the citizen of any state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has a reasonable notice and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

There is nothing new or novel about this case. Every condemnation case is susceptible to the same contentions made by the petitioners in this case. In 18 Am. Jur., Eminent domain, Sec. 4, page 633, the following is stated:

"Accordingly, since the adoption of the Fourteenth Amendment, there is the possibility of a federal question in every taking by eminent domain under state authority, even if all of the requirements of the constitution of the state are held to have been complied with. The due process clause, in addition to its requirements of public use and just compensation, protects the land owner from the adoption of any form of procedure in eminent domain cases which deprives him of a reasonable opportunity to be heard and so to present such objections and claims as he is entitled to make."

Moreover, the use of commissioners in an eminent domain proceeding is usual and not unconstitutional as denying trial by a jury. **Charles v. Big Sandy & C R Co** 142 Va. 512, 129 S.E. 384; Fed. Rules of Civil Procedure, 71A; prac-

tice & Procedure, Barron & Holtzoff, Sec. 1525; 77 A.L.R. 2d 548; Pearson v. Yewdall, 294 U.S. 296, 24 Lawyers Ed. 436.

There is nothing novel about the Virginia procedure after the view and evidence to have Instructions by the Court and, at that time, the litigants have an opportunity to be heard upon the Instructions to be given to the Commissioners. At that time under the Virginia practice, the parties must state their objectons to the Court as to Instructions offered by the condemnor and offer their own Instructions and object to the action of the Court in refusing the same. In addition, an exception must be made to the Court which, in essence, tells the Court of the Parties intent to appeal to the appellate court. There is nothing unusual about such procedure. See **Tiller v. N & W Railway Co.**, 201 Va 222, 110 S. E. 2d 209; **State Highway Commissioner of Va. v. Skillman,** 206 Va. 39, 141 S. E. 2d 700; **6 Mich. Jur.**, Va. & W. Va. Eminent Domain, Sec. 81, page 769; 53 **Am. Jur. Trial**, Sec. 826, 827, page 606, 607.

In **2,872.88 Acres of Land v. United States,** 376 U. S. 192, 11 L. Ed. 2, 629, 84 Supreme Court, 639, rehearing denied, 376 U. S. 937 12 L. Ed. 2, 87, 84 Supreme Court 1131, the Supreme Court of Appeals, through Justice Douglas, said:

> "Moreover, the litigants have a responsibility to assist the process by specifying their objections to instructions, by offering alternate ones, and by making their timely objections to the report in specific rather than in generalized form, as required by equity practice."

It is respectfully submitted that the petitioners offered no objections to the instructions. Petitioners are attempting to evoke federal jurisdiction for the first time in their Motion to Set Aside the Commissioner's Report and relying upon **Chicago, Burlington & Quincy R. Co. v. City of Chicago,** 226-263. In that case there was no procedure permitting an answer by the land owner, whereas in the case at bar the Virginia statute permitted an answer and the petitioners, in fact, did file an answer.

The petitioners contend that the award lacked due process because it was based upon the sole view of the Commissioners. Such is not the facts in this case. The Commissioners had a view of the premises and heard the evidence of many witnesses prior to rendering their report. Their report which is filed as Appendix C to the Petitioners' Petition states that the value of the parcels taken were founded upon two things. First, a view of the property and, second, upon such evidence as was before them.

It is respectfully submitted that the trial court should not have set aside the Commissioner's Report. In 6 Mich. Jur., Va. & W. Va., Eminent Domain, Sec. 81, it is provided at page 768:

> Sec. 81. Generally - Where the proceedings are conducted according to law, and the evidence as to just compensation is in conflict, the court of appeals cannot set aside the finding of the commissioners, unless they proceeded upon erroneous principles, or unless the amount allowed is so grossly inadequate as to show prejudice or corruption on the part of the commissioners. They may base their findings largely upon facts obtained by a view of the property, which do not appear in the record. The law lays great stress upon the matter of the view, the effect of which cannot always be transmitted.
>
> Where it is shown that numerous witnesses testify directly opposite to each other as to the value of the land, it is impossible for the court of appeals to say that the confirmation of the report by the trial court, who saw the witnesses and heard them testify, is plainly wrong or without evidence to support it."

In condemnation proceedings, great weight is given to the view of the premises by commissioners or a jury. **U. S. v. Wise,** 131 Fed. 2d, 851.

In conclusion, it is respectfully submitted that under the foregoing law that the petitioners' property has been taken by the defendant under due process of law. There was

service of process upon the petitioners. Petitioners filed an answer by counsel of their own choosing. Petitioners were given notice of an application being made to the court for the appointment of commissioners. Petitioners exercised their statutory rights of helping select the commissioners by taking two strikes in the elimination of the commissioners from nine to five. The petitioners, by counsel and in person, participated in the view of the land sought to be condemned. All the evidence presented in the case was heard in open court by the petitioners. The petitioners exercised the right of cross examination of witnesses for the defendant. The petitioners presented witnesses in their behalf as to the valuation of the land sought to be condemned. The petitioners, by counsel, participated in formulating the instructions be given by the court to the Commissioners without objection. Petitioners' counsel participated in the closing argument to the Commissioners. Petitioners, by counsel, made a motion to set aside the award and argued the same before the lower court. Petitioners, by counsel, filed a Petition for a writ of Error in the Supreme Court of Appeals of Virginia, which held that there was no error in the proceedings in the Circuit Court for Dickenson County.

CONCLUSION

For the reasons set forth above, the defendant prays that a Writ of Certiorari be denied by Your Honors.

And your defendant will ever pray, etc.

Respectfully submitted,

Robert T. Winston,
Norton, Virginia

Leslie M. Mullins,
Norton, Virginia

Counsel for defendant

APPENDIX

APPENDIX A

APPENDIX OF EXCERPTS FROM TESTIMONY

(The Commissioners were sworn; the reporter was sworn; the Court, counsel and Commissioners took a view of the property under consideration in the case.) (T. 3)

MR. MULLINS: Your Honor, just to save time, we do not have in the record but I think we agreed this morning the Breaks Park Commission had the right to bring this condemnation suit. We agreed to stipulate that and it is just a question of how much.

MR. PHIPPS: All right.

THE COURT: Is that you gentlemen's understanding?

MR. PHIPPS: I said it was agreeable. (T. 24)

(In chambers, instructions were offered to the Court by counsel for the Petitioner and the defendants, and were given by the Court without objection.)

THE COURT: Gentlemen of the Commission, I am going to ask the Clerk to read the instructions. I can read them but I am not taking any chances. I will ask him to read the instructions. These are the Court's instructions, not given on behalf of either party. They constitute the law. As far as the evidence is concerned, you will weigh that from the witnesses you heard testify in this case and apply it to the law as contained in these instructions.

(The Clerk read the instructions; closing argument was heard on behalf of the Petitioner and the defendants, after which argument the Commissioners retired to the jury room and returned with their award in these actions.) (Counsel for defendants were given ten days in which to file exceptions to the report of the Commissioners. Court was adjourned.) (T. 96, 97)

Service of the within Brief of the Defendant, in triplicate, with Appendix attached, in opposition to a Writ of Certiorari to the Supreme Court of Appeals of Virginia is hereby accepted this March 2nd, 1966.

s/ S. H. Sutherland
Counsel for Petitioners

Service of the foregoing Brief, in triplicate, with Appendix attached, in opposition to the granting of a Writ of Certiorari to the Supreme Court of Appeals of Virginia was made by an acknowledgment of the same signed by Counsel of record for the petitioners, pursuant to Rule 33 (3)(a) of the Rules of the Supreme Court of the United States.

Robert T. Hunter

Jesse W. Mullins
Counsel for Defendants